IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE UNITED STATES NATIONAL BANK OF CENTRALIA, a Banking Association, and A. R. TITLOW, as Receiver of Said Bank, *Appellants,*

vs.

THE CITY OF CENTRALIA, a Municipal Corporation, *Appellee.*

No. 2821.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division

Appellee's Brief

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STATEMENT OF THE CASE.

Appellee feels, in view of the statement contained in appellant's brief, that the facts and the statute relating to this case should be more fully laid before the court. The facts material to the decision of the points involved on the appeal of this suit are as follows:

The City of Centralia had and has a population of less than seventy-five thousand, and none of its funds could be lawfully deposited in any bank until such bank had been designated as a depositary of public moneys and a bond given to secure the City against loss thereof, together with a contract whereby the bank agreed to pay not less than two per centum on the average daily balances, where such balances exceeded one thousand dollars, of all municipal funds kept by the city treasurer in said bank while acting as such depositary.

The sections of the Washington statutes relating to the subject are as follows:

> "77-681. Depositories Cities Other Than First Class. That any city or town of the State of Washington having a population of less than seventy-five thousand (75,000) inhabitants, shall upon a majority vote of its city council instruct its city or town treasurer, upon this bill becoming a law and annually thereafter at the end of each fiscal year or at such other times as may be deemed necessary by the treasurer, to designate one or more banks in the county wherein such city or town is located as depositary or depositaries of the moneys required to be kept by said treasurer."
>
> "77-683. Security. Before any such designation shall entitle the treasurer to make deposits in such bank or banks, the bank or banks so designated shall within ten (10) days after the same is filed with the comptroller or town

clerk, file with the comptroller or town clerk of such city or town a surety bond to such city or town in the maximum amount of deposits designated by said treasurer to be carried in such bank, or in lieu thereof shall deposit with the treasurer good and sufficient municipal, school district, county or state bonds, or warrants, or United States bonds, or local improvement bonds, or warrants, or public utility bonds or warrants issued by or under authority of any municipality of this state upon which interest or principal is not in default at the time of such deposit, or first mortgage railroad bonds listed on New York stock exchange, conditioned for the prompt payment thereof on checks duly drawn by the treasurer, which surety bonds or security shall be approved by the mayor and comptroller or town clerk of said city or town and such banks shall also at the same time file with said comptroller or town clerk a contract with said city or town wherein said bank shall agree to pay not less than two per centum on the average daily balances where such balances exceed one thousand ($1,000) dollars of all municipal funds kept by such treasurer in said bank, while acting as such depository; such payments to be made monthly to said city or town while said deposits continue in said depositary; said contracts shall run to said city or town and be in such form as shall be approved by the treasurer, mayor and corporation counsel."

"135-631. Every public officer, and every other person receiving money on behalf or for or on account of the people of the state or of any department of the state government or of any bureau or fund created by law in which the people are directly or indirectly interested, or for or on account of any county, city, town

or any school, diking, drainage or irrigation district, who—

"1. Shall appropriate to his own use or the use of any person not entitled thereto, without authority of law, any money so received by him as such officer, or otherwise * * * shall be punished by imprisonment in the state penitentiary for not more than fifteen years."

"135-633. Every officer or other person mentioned in section 317 (135-631, *supra*) of this act, who shall willfully disobey any provision of law regulating his official conduct in cases other than those specified in said section, shall be guilty of a gross misdemeanor."

"135-635. Every state, county, city or town treasurer who shall willfully misappropriate any moneys, funds or securities received by or deposited with him as such treasurer, or who shall be guilty of any other malfeasance or willful neglect of duty in his office, shall be punished by imprisonment in the state penitentiary for not more than five years or by a fine of not more than five thousand dollars."

Pierce's Code, 1912.

The appellant bank prior to the deposit of the sum involved in this suit had been designated a city depositary to the extent of ten thousand dollars only (Appellee's Exhibit No. 3, Tr. p. 50), and had given to the city a bond in that amount as provided by Section 77-683 of the foregoing statute. It never, however, entered into a contract for the payment of interest as provided by said section, al-

though it did in fact pay the interest prescribed by the statute. (Tr. p. 51.)

Prior to July, 1914, the City of Centralia authorized an issue of bonds in the sum of $300,000 for the purpose of purchasing a privately-owned water system then operated within said city, and converting the same from a pumping to a gravity system and otherwise improving said waterworks for the use of itself and its inhabitants.

Carstens & Earles, Inc., of Seattle, had agreed to purchase the bonds upon delivery by the city from time to time as funds were needed to carry out the objects of the purchase. On or about July 11th, 1914, one Geo. B. Mason, the then city treasurer, delivered 105 of said bonds of the par value of $52,500 to the appellant bank with a draft on Carstens & Earles, Inc., for the amount it was to pay for said bonds, with directions to forward and collect. The bonds were received by the bank, knowing the purpose for which they had been issued and that they had been issued pursuant to the provisions of an ordinance of said city. (Tr. pp. 39, 40, 49.)

The ordinance provided in substance that the bonds should be drawn solely for the purpose of paying the costs and expenses of acquiring, con-

structing, owning and operating a water system, and any surplus from the sale thereof should be applied to the payment of the principal and interest on the bonds themselves. Section 12 of said ordinance reads as follows:

> "Section 12. The money derived from the sale of any of the bonds herein authorized, shall be paid into the said Centralia Water System Fund, as hereinbefore provided, and shall be drawn upon solely for the purpose of paying the costs and expenses of acquiring, constructing, owning and maintaining such water system, and all the costs and expenses connected therewith, and the surplus of the money, if any, from the sale of said bonds over and above the total costs of said waterworks system shall be applied to the payment of said bonds and interest thereon as the same mature." (Tr. pp. 40, 41.)

The appellant bank never gave the city any security other than the depository bond for ten thousand dollars. (Tr. pp. 42, 49.)

About the 12th of July, 1914, the bonds were forwarded by the appellant bank to the National Bank of Commerce of Seattle, Washington, for collection with instructions to deliver same upon payment of a draft drawn on Carstens & Earles, Inc., and to credit appellant bank with the proceeds of the collection and advise it of the credit. The National Bank of Commerce of Seattle was not only

appellant's regular correspondent at Seattle, but one of its reserve banks. The draft was paid to the National Bank of Commerce July 13th, 1914, which bank thereupon gave the appellant bank credit for the amount collected thereon, $50,911,88, and advised the appellant of that fact. On July 13th the appellant bank entered in its books a credit to the city treasurer for this amount, charging a like sum to the National Bank of Commerce.

The total deposits of the appellant bank with the National Bank of Commerce aggregated on that day more than $55,000. (Tr. pp. 39-40.)

There had been for a considerable time $1,000 to the treasurer's credit in the account with the appellant bank in which this collection was entered. Mason, the city treasurer, was absent from the City of Centralia at the time of the collection and entry of credit in his favor and the bank made the deposit to his credit without further advice from him. (Tr. p. 48.) Mason had no deposit slip showing the deposit and no pass book except one relating to the special account explained in his evidence, which pass book showed a balance by reason of said special account of $2,638.31 to his credit. The city treasurer never intended to deposit the proceeds of

said bonds in the appellant bank without additional security. (Tr. pp. 48-49, 51.)

By July 21st Mason had returned to Centralia, and learning that the bank had credited him with the proceeds of the sale of the bonds he notified the bank that an additional bond would have to be given by it to the city on account of said deposit. This bond, however, was never given. The treasurer nor any one else ever drew against the account. (Tr. pp. 48-49-50-51.)

On the 19th day of September, 1914, appellant bank closed its doors, and on the 21st of September, 1914, it passed into the hands of a receiver. At the time it closed its doors it owned and was in the possession of certain improvement bonds and warrants theretofore issued by the city and which the city was required to pay, aggregating upwards of $12,000.00, and which passed into the hands of the receiver upon his appointment.

On January 19th, 1915, appellee filed its bill of complaint in the lower court to restrain the receiver from applying any of the funds of the bank in his hands in payment of any of the indebtedness of the bank until the preferred claim of the appellee should be paid, and to impress a trust upon such funds, and further praying that the city

be permitted to offset a proportional amount of its claim against said improvement bonds and warrants should it be held that the city was not entitled to the relief which it sought.

On February 8th, 1915, an order for a preliminary injunction was made by the court, and on February 10th a writ of preliminary injunction issued commanding and enjoining the receiver from applying by dividend or otherwise the sum of $44,553.09 of the money then in his hands, or in the possession of the comptroller of the currency, by reason of the receivership, toward the payment in whole or in part of the indebtedness of said bank until further order of the court, and directing and requiring the receiver to hold in his possession until further order of the court said sum after making allowance for the expenses of administration. (Tr. pp. 122 to 126, inclusive.)

The injunction was made perpetual upon final hearing, the court holding, however, that it was unnecessary to determine the right of offset with respect to said bonds and warrants, because the city was able to trace a sum in excess of the amount of its claim into the fund in the receiver's hands, and was therefore entitled to the relief sought.

The case is reported in 221 Federal Reporter, at page 755.

Upon the final hearing the lower court rendered the following opinion, which has not been published:

"CUSHMAN, District Judge.

"This cause was before the court upon application for a preliminary injunction (221 Federal, 751). It is not necessary to restate the facts of the case at length, or all of the conclusions reached.

"The city treasurer of plaintiff, July 10th or 11th, 1914, deposited with the United States National Bank certain bonds, with directions to collect the sale price from Carstens & Earles, Seattle bond buyers. The United States National Bank had no authority, for want of the statutory bond, to receive for deposit the proceeds of this collection. It sent the bonds to its Seattle correspondent and reserve agent, the National Bank of Commerce. That bank collected for the bonds and gave the United States National Bank credit for the proceeds, $50,911.88.

"On July 13, 1914, the total deposits by that bank with the National Bank of Commerce amounted to $55,069.77. From July 11th, the account of the United States National Bank with the National Bank of Commerce had been overdrawn $11,071.64. This overdraft was wiped out by these deposits, leaving a balance on that day of $44,998.13. On this day, July 13th, the United States National Bank, being advised of the collection, gave the treasurer of claimant credit on its books for the amount, and charged a like amount against the National Bank of Commerce.

"In the ordinary course of business this balance was reduced by withdrawals, by draft direct from the United States National Bank, by the National Bank of Commerce cashing checks upon the United States National Bank, drawn by its depositors and by drafts drawn by the United States National Bank in favor of other correspondent banks and reserve agents until, on July 22, 1914, according to the books of the National Bank of Commerce, the account was again overdrawn. According to the books of the United States National Bank this overdraft did not occur until July 28th. This discrepancy is explained by the fact that on July 22nd there were remittances from the United States National Bank in the mails sufficient to offset this overdraft, which, on the books of the latter had been charged to the National Bank of Commerce.

"When the bank closed its doors, September 19, 1914, it had in its vaults $32,439.44, which came into the receiver's hands. The smallest amount of cash in its vaults between July 13th and September 19th was $23,527.86, on September 17th. Between July 13th and September 19th, there was at all times with its reserve agents and in its vaults more than $50,911.88.

"The court has been asked to reconsider its former ruling: That the cash in its vaults and the amount of its reserves with its correspondents and reserve agents would be treated as one fund, and that the proceeds of the bonds traced into this fund would be presumed to remain there until the contrary was shown. It is contended that the amounts with its correspondents and reserve agents were merely debts

owing to the United States National Bank and a part of the general insolvent estate.

"A bank, which, in order to sell money at a distance, that is, deal in exchanges, for that purpose, keeps throughout the country deposits with various banks and has, by arrangement, a course of dealing with those banks—they cashing the drafts sold by it—has done more than to create the mere relation of debtor and creditor between itself and these banks.

"The decision in this case is controlled by *Merchants' National Bank vs. School District No. 8* (94 Fed. 705), and *Moreland vs. Brown* (86 Fed. 257). The present case, in all its essentials, cannot be distinguished from *Merchants' National Bank vs. School District No. 8,* decided by the Circuit Court of Appeals in this Circuit.

"On the argument of the present case it was contended, on behalf of the receiver, that, in the case of *Merchants' National Bank vs. School District No. 8* (94 Fed. 705), the Merchants' National Bank of Helena, Montana, which subsequently became insolvent, actually received into its vaults prior to insolvency, the cash collected by the National City Bank of Boston, and that, therefore, much that was said by the Circuit Court of Appeals in that decision was not necessary to the decision and should be treated as dictum. Included in which, I conclude, is the following extract from that opinion:

> " 'It is contended that the finding of the master, to the effect that Palmer deposited with the bank the sum of $13,056, is at variance with the facts as they are disclosed in the evidence. It appears from the evidence that the bonds were sold in

Boston, and that the sum realized thereon was deposited with the National City Bank of Boston, which bank was the correspondent of the Helena bank. The Boston bank notified the Helena bank that that amount had been placed to the credit of the latter by a letter which was received by the bank at Helena on July 11, 1896. On July 3rd the Helena bank had with the Boston bank a credit of $39,011.60, against which it drew on that day the sum of $10,000, leaving a balance of $29,011.60, which was not further reduced until July 13th, when a draft of $8,075 was drawn against it. On July 11, 1896, the Helena bank gave the personal account of Palmer a credit on its books of the full amount of the proceeds of the sale of the bonds. Thereupon Palmer gave the bank his personal check for $13,056, and requested that an account be opened as found by the master. Upon these facts it is contended that the money which was realized on the sale of the bonds was never actually deposited with the Helena bank. *It is not material in this case whether it was actually so deposited or not. It is undisputed that the money belonged to the school district, and that it was deposited with the bank's correspondent in Boston, and that, upon the receipt of intelligence of such deposit, the Helena bank opened the account, and entered into the agreement which was indicated in the findings of the master. The Helena bank, if it had not then the money in its actual possession, had it under its control, and could lawfully, in the due course of banking, have paid it over to Palmer or to the school district. Instead of so paying the money, it chose to enter into the*

arrangement which was consummated. Neither the bank nor the receiver is now in a position to say that the money received by the bank's agent was not actually received by the bank. The question is not complicated by any failure on the part of the Boston bank to pay to the Helena bank in full the amount which it received. The Helena bank received the money in the due course of business. In view of the receipt of that sum by its agent, and the arrangement which it made with Palmer on behalf of the school district, it will be deemed to have diverted from its funds in bank on July 11, 1896, the sum of $13,056, and to have placed the same to the credit of the school district. That sum became and was from that date a trust fund, subject to disbursement only upon the order of the school district (at pp. 707 and 708). (The italics are the court's.)'

"In the foregoing case the fund collected, decreed to be a trust fund, amounted to $13,056. The receiver on his appointment took possession of $19,533 in cash and collected from other assets $200,000. An examination of the record and briefs in that case discloses that, at the time of the failure of the Merchants' National Bank of Helena, there was to its credit in the National City Bank, its Boston correspondent, only $1,077.56. It was shown that no part of the actual money received by the National City Bank of Boston was ever received by the Merchants' National Bank of Helena. There was no evidence of other disposition of it than in the ordinary course it would probably be forwarded to New York or Chicago, on which points most of the exchange sold by the Merchants' National Bank would be drawn.

"Upon this state of facts, it was strenuously contended by the appellant in that case that no trust could be impressed upon the funds in the receiver's hands because the money collected in Boston was not traced to the vaults of the Merchants' National Bank of Helena but, in great part, to other banks and as there was no showing as to the amount of the fund in the vaults of the Merchants' National Bank of Helena from the time of the collection in Boston to the receivership, nor evidence as to whether at all such times the cash in such vaults was equal or greater in amount than the collection.

"The record in that case being such, this court cannot conclude that any part of the language quoted was unnecessary to the determination of that cause and, under the rule laid down in that case and the *Moreland* case (86 Fed. 257) a trust will be impressed upon the amount in the vaults of the United States Natinoal Bank when it closed and upon the amount with its reserve agents and correspondents.

"Of the $55,069.77 deposited with the National Bank of Commerce, $11,071.64 was credited to the overdraft of the United States National Bank, reducing the amount for which a preference is established to $44,998.13. Any presumption as to the cash assets of the United States National Bank coming into the hands of the receiver being increased to the extent of $11,071.64 is negatived by the fact that this money was used in settling the prior indebtedness of the United States National Bank to the National Bank of Commerce, and the same presumption would not be warranted as in case of the greater balance created on account of the remainder of such collection. That which was

added to its assets can be presumed to remain as a part thereof until the appointment of the receiver; but that which is shown never to have become an asset cannot. There is no chance for the presumption to operate as to it.

"Upon the payment to the city by the surety company, giving the bond for the city's deposit in the United States National Bank of $10,000, the face of its bond, the city applied such payment so as to extinguish the debt of the bank on account of a special deposit in another account, $2,641.21, leaving, of the bonding company's payment, $7,358.79 to be applied upon the city's other account, in which the proceeds for the sale of the bonds had been credited.

"In this account there had been, long prior to the bank's giving the city treasurer credit for the proceeds of the bonds, a deposit of $1,000. This, with the $50,911.88 collected for the bonds, made a total due the city in this account of $51,911.88, subtracting from which the remainder of the surety company's payment, $7,358.79, reduces the amount to $44,553.09, for which a preference is decreed.

"As already shown, the city has only been able to trace $44,938.13 of the $50,911.88 into the fund in the receiver's hands; but, as that amount exceeds the total balance due it, after applying the payment made by the bonding company, it is not necessary to determine whether the city would be entitled to set off any part of its claim against certain warrants held by the receiver for money to be raised upon assessments in certain improvement districts within the City of Centralia.

"Findings and judgment accordingly."

The evidence shows, and it is conceded that the appellant bank had not and has not sufficient money, property or assets to pay its indebtedness in full. The city realized on the $10,000 surety bond given by appellant to secure deposits to the extent of that sum, which reduced the claim of the city, as shown by the opinion of the court, to $44,553.09.

Between and including July 13th and September 19th, 1914, the lowest sum in cash on hand in the appellant bank was $23,527.86, on September 17, 1914. (Tr. p. 44.)

The lowest sum in the reserve banks and the appellant bank on any day between and including July 13th and September 19th, 1914, upon any theory of the case, was the sum of $69,141.80, there being then in the appellant bank $23,527.86 and in the reserve banks the sum of $45,613.94, or the total sum of $69,141.80 on said date. (See Plaintiff's Exhibit 1, under date of September 17, Tr. p. 47.)

The reserve banks of the appellant bank between and including those dates were as follows: Chase National Bank of New York, National Bank of Tacoma, First National Bank of Portland, National Bank of Commerce of Seattle, Bank of California, Tacoma; The Continental & Commercial National Bank, Chicago; First National Bank of San Fran-

cisco, Northwestern National Bank of Minneapolis, Seattle National Bank of Seattle, Northwestern National Bank of Portland and Merchants' National Bank of Portland. (Tr. pp. 44-45.)

The earnings of the appellant bank between and including July 13th and September 19th, 1914, exceeded the expenses and losses of said bank in the sum of $808.58.

The lowest amount of money in non-reserve banks of the appellant bank between and including said dates was on August 29th, 1914, $10,938.18.

The books of the appellant bank show that on July 13th, 1914, debits to the National Bank of Commerce of Seattle were as follows:

Collection No. 5470.....$ 180.11
Collection No. 5472..... 50,911.88

and an item described as "sundries" of $4,416.59, the total of these items being $55,508.58.

The appellant bank deposited with the National Bank of Commerce in the month of July, 1914, $184,102.01. (Testimony of E. G. Shorrock, Tr. pp. 56 and 57.)

There was a transfer from the National Bank of Commerce to the Bank of California between and

inclusive of July 13th and July 28th, 1914, of $62,-500, and a transfer to the Continental & Commercial National Bank of Chicago of $20,000, and a transfer to the Bank of Italy of $15,000. (Tr. p. 57.)

On July 15th, 1914, the National Bank of Commerce was credited by the Centralia bank with $12,-225, which comprised three items, as follows: July 13th, $3,610; July 15th, $4,870 and $3,745. These items represented notes which were sent by the National Bank of Commerce to the Centralia bank for collection. (Tr. p. 57.)

It was admitted at the trial that said notes were sent by the National Bank of Commerce of Seattle to the appellant bank for collection, and that the appellant's account with the National Bank of Commerce was charged by the National Bank of Commerce in the amount thereof and the appellant credited a like sum on its book to the National Bank of Commerce.

The amount of money on the dates mentioned in the National Bank of Commerce of Seattle to the credit of the appellant was reduced by these transactions in the sum of $12,225, according to the books of the two banks. (Tr. pp. 57 and 58.) If the $12,-225 debit and credit had not been given no overdraft

would have existed, if any did in fact exist, on July 28th. (Tr. p. 71.)

Plaintiff's Exhibit No. 4, Transcript, pp. 59 to 64, inclusive, shows the transfers of money from the various banks that the appellant was doing business with, and shows the manner in which the appellant was kiting its funds from one bank to another between July 13th, 1914, and September 19th, 1914, both dates inclusive.

Plaintiff's Exhibit No. 5, Transcript, p. 65, is a statement showing the state of the account between appellant bank and the Bank of California at Tacoma, between July 12th and July 20th, 1914. A similar statement is shown between the appellant bank and the Continental & Commercial Bank of Chicago, between July 11th and August 14th, 1914, as plaintiff's Exhibit No. 6, Transcript, pp. 66 to 68, inclusive.

When the appellant bank failed it had in its own vaults in the bank at Centralia $32,439.44 in cash, which passed into the hands of the receiver. (Tr. p. 87.) The $12,225.00 notes referred to were charged by the National Bank of Commerce to the appellant bank and by the latter bank credited to the former bank, and the notes marked paid. (Testi-

mony of H. O. Johnson, Tr. p. 72; appellee's Exhibits 7 and 8, Tr. pp. 73 and 74.)

By letter of July 10, 1914, the appellant bank instructed the National Bank of Commerce upon making collection of the $50,281.88 and interest on account of said 105 bonds to credit same to the account of the appellant bank. (Exhibit 9, Tr. p. 75.)

On July 22nd there was an apparent overdraft in the National Bank of Commerce of $632.97, while the appellant bank had a credit on the 23rd day of July, according to the National Bank of Commerce books, of $13,809.94. The appellant's bank book, however, showed that on July 22nd it had a credit of about $13,000 in the National Bank of Commerce; this was because on that date certain items were in transit to the National Bank of Commerce. (Tr. pp. 79 and 80.)

Checks and drafts are treated by banks as actual cash and money deposited in reserve banks is treated as actual cash. (Tr. pp. 80, 81 and 86.)

Appellee's Exhibit No. 10 (Tr. pp. 84 and 85) is a statement of balances due from its various correspondents, according to its books, between July 13th and September 19th, 1914, inclusive. It shows a balance due from reserve agents, banks not reserve agents, sundry banks and bankers and totals.

Appellee's Exhibit No. 11 is a transcript from the books of appellant bank showing the condition of the account between that bank and the National Bank of Commerce between July 11th and September 19th, 1914, inclusive. This exhibit is not printed in the record. (See Tr. p. 85.)

The items aggregating $12,225.00 had been discounted in the National Bank of Commerce on the guaranty of the appellant bank, and when they fell due the charge and credit referred were given and the notes were subsequently renewed and paid by the makers.

In the month of July, 1914, and after the proceeds of said bonds had been paid into the National Bank of Commerce of Seattle, appellant bank transferred from said bank to other reserve banks upwards of $47,500.00. (Tr. p. 102.)

Between July 13 and July 28, 1914, inclusive, appellant bank transferred from the National Bank of Commerce to other reserve banks $82,500.00. (Tr. pp. 110, 111.)

ARGUMENT.

While it is undisputed that the lowest sum in the vaults of the appellant bank at Centralia between July 12th and September 20th, 1914, was $23,527.86, and that the lowest sum in the reserve banks of the appellant bank at no time between said dates was less than the sum of $45,613.94, or a total of $69,141.80, it is nevertheless insisted that the court erred in finding that the proceeds of the sale of the bonds—$50,911.88—was ever in the actual possession of the defendant bank. The deposit by the appellant bank with itself of $50,911.88, by giving the treasurer credit for that amount upon its books, was in absolute violation of the statute governing the deposit of public funds, and the appellant bank knew, and was bound to know as a matter of law, that the money so collected and deposited, was held by the city treasurer as a public officer in trust for the City, and that the money could not be used for any purpose other than the purchase and improvement of said system of water works.

The contention of appellants is, we submit, without merit on both reason and authority and is clearly overruled by the decisions of this court and of the Supreme Court of the United States. It has never

been successfully denied, so far as we know, that the possession of an agent is not the possession of the principal; and inasmuch as the National Bank of Commerce of Seattle was the agent of the appellant bank, it seems idle to argue that the proceeds of the sale of the bonds never in law or in fact passed into the possession of the appellant bank. It exercised the right of dominion, control and disposition of these funds, without limitation or restraint, and it is now argued that, notwithstanding this, it neither in fact nor in law ever had possession of the fifty thousand-odd dollars which it kited from one reserve bank to other reserve banks, in order to conduct its business and keep itself afloat.

The proceeds of the bonds collected by the appellant bank through its agent, the National Bank of Commerce, immediately upon being credited to the appellant bank, passed into its possession as fully as though the money actually had been paid over its counter.

Commercial National Bank vs. Armstrong,
148 U. S. 50.

This case is, aside from the decisions of this court, a complete answer to the contention of the appellants, for it determines two points, both of which are absolutely fatal to the position assumed

by them. This case holds, first, that if the appellant bank was indebted to its sub-agent bank, and the money when received was entered as a credit to such indebtedness, the money must be considered as reduced to possession and as having passed into the general funds of the appellant bank; second, that if such indebtedness did not exist and the moneys remained in the hands of the sub-agent bank, subsequently to be remitted to appellant and were in fact paid to the receiver after his appointment, the fund was subject to the trust created by the relationship between the banks.

In stating the facts of the case Mr. Justice Brewer said (p. 53):

> "The conclusions of the circuit judge were that the relation between the two banks was that of principal and agent; a relation which continued not only while the paper was held by the Fidelity Bank, but after the money had been collected thereon; but that in order to enforce a trust in favor of the plaintiff, as to any of the moneys so collected, they must be specifically traceable. * * * This paper had substantially all passed into the hands of other banks, to whom it had been sent by the Fidelity Bank, as its sub-agents, and the circuit court judge held that if the Fidelity was indebted to these local banks, sub-agents, and the collections, when made, were entered in their books as a credit to such indebtedness, *they must be considered as reduced to possession and as having passed into the general funds of the Fidelity;*

but that, on the other hand, if the Fidelity was not indebted to the sub-agent banks, and the collections remained in their hands to be subsequently remitted to the Fidelity, and in fact were paid to the receiver after his appointment, they were specifically traceable, and were therefore subject to the trust created by the relationship between the two banks, and payment thereof could be enforced out of the funds in the hands of the receiver."

In the course of the opinion, the court (p. 53) said:

"We agree with the circuit judge that the relation created between the banks as to uncollected paper was that of principal and agent, and that the mere fact that a sub-agent of the Fidelity Bank had collected the money due on such paper was not a mingling of those collections with the general funds of the Fidelity, and did not operate to relieve them from the trust obligation created by the agency of the Fidelity, or create any difficulty in specifically tracing them. As to such paper, the transaction may be described thus: The plaintiff handed it to the Fidelity, the Fidelity handed it to a sub-agent, the sub-agent collected it and held the specific money in hand to be delivered to the Fidelity; then the failure of the Fidelity came and the specific money was handed to its receiver. That money never became a part of the general funds of the Fidelity; it was not applied by the sub-agent in reducing the indebtedness of the Fidelity to it, but it was held as a sum collected, to be paid over to the Fidelity, or to whomsoever might be entitled to it. The Fidelity received the paper as agent, and the endorsement 'for collection' was notice that its

possession was that of an agent and not of owner. * * * The plaintiff then, as principal, could unquestionably have controlled the paper at any time before its payment, and this control extended to such time as the money was received by its agent, the Fidelity. * * * Whether it be said that such funds are specifically traceable in the possession of the sub-agent, or that the agent has never reduced those funds to possession, or put itself in a position where it could rightfully claim that it has changed the relation of agent to that of debtor, the result is the same. The Fidelity received this paper as agent. At the time of its insolvency, when its right to continue business ceased, it had not fully performed its duties as agent and collector; it had not received the moneys collected by its sub-agent. They were traceable as separate and specific funds, and therefore the plaintiff was entitled to have them paid out of the assets in the hands of the receiver, for when he collected them from these sub-agents, he was in fact collecting them as the agent of the principal. *No mere bookkeeping between the Fidelity and its sub-agent could change the actual status of the parties or destroy rights which arise out of the real facts of the transaction.*"

At the time the proceeds of the bonds were paid into the National Bank of Commerce, the appellant bank had an overdraft with the former bank in a sum in excess of $11,000, and a sum sufficient to liquidate this indebtedness was deducted by the National Bank of Commerce from the proceeds of the bonds. It is shown by the evidence that the

appellant bank had endorsed and guaranteed the payment of promissory notes to the amount of $12,225.00 to the National Bank of Commerce, and when these notes fell due, this bank forwarded same to the appellant bank and charged it with the amount thereof, and appellant bank thereupon gave the National Bank of Commerce a corresponding credit.

In *Commercial National Bank vs. Armstrong, supra,* the court in the course of its opinion further said (p. 57):

> "We also agree with the circuit court in its conclusions as to those moneys collected by sub-agents to whom the Fidelity was in debt, and which collections had been credited by the sub-agents upon the debts of the Fidelity to them before its insolvency was disclosed, for *there the moneys had practically passed into the hands of the Fidelity, the collection had been fully completed. It was not a mere matter of bookeeping between the Fidelity and its agents; it was the same as though the money had actually reached the vaults of the Fidelity.*"

So we find that more than $23,000 of the proceeds of the sale of the water bonds under any possible theory of the case—as held by the Supreme Court in the 148 U. S., *supra*—actually passed into the vaults of the appellant bank, and that the total amount of the sale, $50,911.88, immediately upon the

collection thereof, passed into the actual possession of the appellant bank, under the authority of said case, and that inasmuch as a sum in excess of $69,000.00 was always either in the bank at Centralia or in its reserve banks, or both, the lower court was correct in holding that a trust should be impressed to the extent of appellee's claim.

Especially is the ruling of the lower court correct when we find that the appellant bank was required by law at all times to have on hand in lawful money of the United States an amount equal to at least fifteen per centum of the aggregate amount of its notes in circulation and of its deposits, and that to meet this requirement of the law, it was allowed to count its deposits with reserve banks as lawful money on hand.

See Sections 5191-5192 Fifth Federal Statutes Annotated, pp. 124-125, and the latter part of Section 19, p. 280, 1914, Supplemental Federal Statutes Annotated.

It would seem, therefore, to be not only unreasonable but unjust to hold that the trust fund involved in this case, while at all times counted, and allowed by law to be counted, by the appellant bank as cash on hand, for the purpose of continuing its business and inviting the deposit of trust and other

funds, did not in fact pass into the possession of the appellant bank, whether actually in its own vaults or in the vaults of its reserve banks.

While the relation of debtor and creditor could lawfully exist between the Commercial National Bank and the Fidelity Bank, in the 148 U. S., *supra,* and the money collected by the Fidelity Bank either by itself or through its sub-agents for the Commercial National Bank could lawfully become a part of the general funds of the Filedity Bank, the relation of debtor and creditor could not lawfully exist between the city and the appellant bank; nor could the collected water funds become lawfully mingled with the general funds of the appellant bank, because the proceeds of such bonds were deposited with that bank in violation of the statutes of the State of Washington, *supra.*

In *Merchants' National Bank vs. School District Number Eight,* 94 Fed. 705, at the bottom of page 706 it is said, in speaking of the Montana statute:

> "Section 1817 denounces the penalty for the violation of the statute. Under the terms of the statute, *the bank could not lawfully receive the moneys of the school district as an ordinary deposit, or mingle the same with its own funds.* The bank had knowledge of the

nature of the funds, and was chargeable with knowledge of the statute."

In *San Diego County vs. California National Bank,* at page 62, it is said:

> "But the money of the complainant was deposited by its officers, and received by the bank, not only without the knowledge of complainant, but contrary to law. To put the complainant on the same plane with the ordinary creditors, is to make the former share in a loss to which it did not voluntarily subject itself, and to give the latter a share in money which never in equity became the property of the bank."

In *Hemrich Brewing Company vs. Kitsap County,* 45 Wash. 458, the Supreme Court of the State of Washington said:

> "The city could be bound by no promise of the city treasurer to leave the money in the bank, as such promise was not authorized by law."

See also

Moreland vs. Brown, 86 Fed. 257.

Holder vs. Western German Bank, 136 Fed. 90.

Attorney General vs. Hanchett, 4 N. W. 182-3-4.

Capital National Bank vs. Cold Water Nat. Bank, 69 N. W. (Neb.) 115.

It is urged at page 44 of appellant's brief that

the case of *Moreland vs. Brown,* 86 Fed. 257, is not in point, because the plaintiff there expressly refused to have any contractual relations with the Helena bank. In the case at bar the city treasurer knew nothing of the deposit and credit to his account, and when he learned of the fact he told the bank they would have to give a bond, which was never given. The *Moreland-Brown* case is, however, directly in point, because in the suit at bar no contractual relation of debtor and creditor did exist or could lawfully exist between the City and the Centralia bank in the absence of the bond required by law. This point has been not only directly decided against appellant's contention by this court in 94 Fed., *supra,* but in the case of *Commissioners vs. Strawn,* 157 Fed. 49, cited by appellants. At page 50 of this case it is said:

> "* * * The ordinary relation of debtor and creditor did not exist between the bank and the county treasurer, because a county treasurer in Ohio is positively forbidden, except ununder circumstances which do not exist in this instance, to make a general deposit in any bank of taxes collected. * * * Blyth had, therefore, no authority to deposit the funds as a general deposit with the Galion Bank, and the latter was bound to know that it could not receive and mingle this fund with its general moneys. *Merchants' National Bank vs. School District Number Eight,* 94 Fed. 705; 36 C. C. A.

> 432. Under the settled doctrine, the bank acquired no title to the public fund and the public can recover the same so far as it can be identified or traced into property which has come into the receiver's possession. That the county treasurer and the county commissioners had knowledge of this deposit, and that it was in pursuance of a course of business pursued for several years in succession without objection, does not operate as an estoppel; for there being originally no authority to violate the positive provisions of the statute in either or all of these officials, no consent or acquiescence on their part will cure the title of the bank."

And it is submitted that no well considered case to the contrary can be found, notwithstanding appellant's instance that the relation of debtor and creditor existed between the city and the bank.

Mason, the city treasurer, delivered the 105 water bonds to the appellant bank with his draft as city treasurer drawn on Carstens & Earles, Inc., for collection. (Tr. pp. 39-49.) Accompanying these bonds and the draft, appellant bank sent the National Bank of Commerce, under date of July 10th, 1914, the following letter (omitting caption):

> "National Bank of Commerce,
> Seattle, Washington.
>
> Gentlemen:—
>
> We enclose herewith for collection, draft on Carstens & Earles, Inc., for $50,281.88 and interest. We are sending this and also package of

bonds amounting to $52,500.00 herewith by special messenger.

Kindly deliver said bonds, together with affidavits or certificates attached to Carstens & Earles upon payment of draft, together with interest on $52,500.00 from May 1st to date of payment, at the rate of 6% per annum.

When paid kindly credit same to our account and advise.

Very truly yours,

J. W. DAUBNEY,
Cashier."

(Appellee's Exhibit No. 9, Tr. p. 75.)

In so far, therefore, as the rights of the City of Centralia were and are concerned, everyone dealing with said bonds knew or had notice that they were water bonds of said City and by it sold to Carstens & Earles, Inc.; that the city treasurer in drawing his draft and seeking to collect the proceeds of the bonds, was acting in a fiduciary capacity; that the money derived from the sale of the same was public funds, and that the relation of debtor and creditor could not exist with respect thereto between the City and the appellant bank unless the statute relating to the deposit of public moneys had been complied with.

If, therefore, the National Bank of Commerce could not lawfully deduct from the trust fund ap-

pellant bank's overdraft of $11,071.64, which existed on July 11, 1914, or the $12,225.00 which it owed the bank by reason of having guaranteed the payment of the notes, and which sums, according to the books of the banks, were deducted from the trust fund, then the account with respect to such fund was at no time between and including July 13th and September 19th, 1914, overdrawn or depleted in the National Bank of Commerce. And by adding the sum of such indebtedness, $23,296.64 to the lowest sum of money which it is admitted was in the vaults of the Centralia bank between and including said dates, to-wit, $23,527.86, we trace the sum of $46,-824.50—or $2,271.41 in excess of the claim of the City—into the possession of the Centralia bank and which passed by operation of law into the possession of the receiver; for if the Seattle bank held the fund as the agent of the Centralia bank, it held the same as the agent of the receiver upon his appointment and qualification.

In *Central National Bank of Baltimore vs. Connecticut Mutual Life Insurance Company,* 104 U. S. 54, the court, at pages 63 and 64, said (see also p. 66):

> "A bank account, it is true, even when it is a trust fund, and designated as such by being kept in the name of the depositor *as trustee,*

differs from other trust funds which are permanently invested in the name of trustees for the sake of being held as such. For a bank account is made to be checked against, and represents a series of current transactions. The contract between the bank and the depositor is that the former will pay according to the checks of the latter, and when drawn in proper form, the bank is bound to presume that the trustee is in the course of lawfully performing his duty, and to honor them accordingly. But when against a bank account, designated as one kept by the depositor, in a fiduciary character, the bank seeks to assert its lien as a banker for a personal obligation of the depositor, known to have been contracted for his private benefit, it must be held as having notice that the fund represented by the account is not the individual property of the depositor, if it is shown to consist, in whole or in part, of funds held by him in a trust relation."

See also

Duncan vs. Jaudin, 15 Wall 165.

Shaw vs. Spencer, 100 Mass. 389.

If, on the other hand, the National Bank of Commerce could lawfully apply portions of such proceeds to the discharge of said overdraft of $11,071.64, and to the payment of said notes aggregating $12,225.00, which produced the alleged overdraft of July 28th, 1914, if any such existed, said two sums aggregating $23,296.64 immediately passed into the vaults of the Centralia bank under the authority of

148 U. S., *supra,* and the decree of the lower court is correct, upon either theory.

Appellants argue that because of the transfers of money from the National Bank of Commerce to other reserve banks between and inclusive of July 13th and September 19th, 1914, the funds were depleted and that appellee has therefore failed to trace the proceeds of the bond sale in the possession of either the bank or its receiver. But in advancing this argument, they overlook the important fact that there was never between the dates indicated less than $45,613.94 in the reserve banks, nor less than $23,527.86 actually in the vaults of the appellant bank, or a total of $69,141.80 always on hand, and that no person other than the appellee contends *that any specific part of his money ever went into any of the reserve banks.* Whenever an overdraft existed in one reserve bank, there was a sum in excess of $45,000 in other reserve banks, and this sum passed into the hands of the receiver upon his appointment and qualification. The money, therefore, in the reserve banks was the property of the City to the extent of its claim, not only because of the presumption that the appellant bank in liquidating its indebtedness used its own money and not the fund which it held in trust for the City, but because under

the evidence and the law, the money so held was and is the property of the City. And the fact that it transferred this fund from one reserve bank to another or other reserve banks, is of no consequence so long as we trace a sum in excess of appellee's claim at all times between the material dates in the possession of the appellant bank, whether in its own or the vaults of its reserve banks or both. It is also wholly immaterial whether the relation of debtor and creditor existed between the appellant bank and its reserve agencies, or the city treasurer, in so far as the rights of the City are concerned, for whatever that relation may have been, no right of the City could be defeated thereby.

National Bank vs. Insurance Co., 104 U. S. 54-66.

This question is put at rest in this circuit by the decisions of

National Bank vs. School District No. Eight, 94 Fed. 705, and

Moreland vs. Brown, 86 Fed. 257,

which undoubtedly lay down the correct rule of law.

It is also insisted that because this court in 94 Fed. 705 said in the course of the opinion, "The Helena bank received the money in the due course of business," that the Helena bank either received

the actual money, or that this money released securities from the Fourth National Bank of New York which actually passed into the hands of the receiver. Of course, the Helena bank received the money in due course of business, just as the appellant bank received our money, for the Boston bank was, as held by this court, the agent of the Helena bank, as fully as the National Bank of Commerce was the agent of the appellant bank; and this is exactly what this court undoubtedly had in mind when it used the above quoted words, because it is absurd to say that the possession of the agent is not the possession of the principal.

Judge Cushman, in the course of his opinion, *supra,* in examining the insistence of appellant that the foregoing case (94 Fed., *supra*) was not in point on this question, said:

> "The fund collected decreed to be a trust fund amounted to $13,056. The receiver on his appointment took possession of $19,533 in cash and collected from other assets $200,000. An examination of the record and briefs in that case (94 Fed.) discloses that at the time of the failure of the Merchants' National Bank of Helena, there was to its credit in the National City Bank, its Boston correspondent, *only $1,077.56.* It was shown that no part of the *actual money received by the National City Bank of Boston was ever received by the Merchants' National Bank of Helena.* There was

> no evidence of other deposit of it than in the ordinary course. It would probably be forwarded to New York or Chicago, on which points most of the exchange sold by the Merchants' National Bank would be drawn. Upon this state of facts it was strenuously contended by the appellant in that case that no trust could be impressed upon the funds in the receiver's hands, because the money collected in Boston was not traced to the Merchants' National Bank of Helena, but in great part to other banks, and there was no showing as to the amount of the funds in the vaults of the Merchants' Bank of Helena from the time of the collection in Boston to the receivership, nor evidence as to whether at all such times the cash in such vaults was equal or greater in amount than the collection."

The cases of *Schuyler vs. Littlefield,* 232 U. S. 710, and *In re Brown,* 193 Fed. 294, cited by appellant, have no application to the case at bar, because there the fund was wholly depleted. In the case at bar appellee's fund was never depleted, neither could it be lawfully mingled.

It would serve no useful purpose to review the numerous authorities cited by appellant, because many of them have no application to the principle involved here, in that we are not seeking in this case to trace securities which were purchased by the use of a trust fund, or dealing with cases where the fund was *wholly depleted,* or seeking a decree

against *all the assets* of the bank, such as notes, bonds, and other securities, upon the theory that our money had been applied to the purchase of such securities, as complainants sought to do in *Schuyler vs. Littlefield* and *In re Brown, supra.* Neither are we dealing with cases similar to that of *City Bank vs. Blackmore,* 75 Fed. 771, where the plaintiff bank sent a draft which it undoubtedly owned to its correspondent bank for credit, and which bank sent the same to its correspondent to be credited to its account, and which was used in payment of the indebtedness of the first and second named banks with the assent of all parties concerned.

Every material point urged against the holding of the lower court has been settled by the decision of this court in the cases of

Merchants' National Bank vs. School District Number Eight, 94 Fed. 705, and

Moreland vs. Brown, 86 Fed. 257, and authorities therein cited,

as pointed out by the district judge in the opinion, *supra,* which he rendered upon the final hearing. We have, however, in the case at bar a stronger case than the one determined in *Merchants' National Bank vs. School District Number Eight, supra,* because in the case at bar the City's money at the

time of the failure of the bank was on deposit in the bank at Centralia and its reserve banks, while in *Merchants' National Bank vs. School District Number Eight,* the money— so far as appears from the opinion of the court—was deposited by the Helena Bank in its correspondent bank only at the City of Boston.

In *Montague vs. Pacific Bank,* 81 Fed. 602, Judge Morrow in the course of the opinion said (p. 603):

> "It is contended that the money remitted by complainants was placed to the account of the Pacific Bank in the National Bank of Commerce, at New York; that it was not sent directly to the Pacific Bank, *but became a part of the account between the two banks, and the identity of the deposit was lost;* and that, therefore, the complainants should be admitted to share only with the other creditors in the pro rata distribution of the assets of the bank. The National Bank of Commerce was the correspondent, in New York, of the Pacific Bank. * * *
>
> "It is clear from this evidence that the bank had received through its agent in New York, prior to its suspension, the deposit in question for transmittal to the Puget Sound National Bank, and that it was a special deposit, made for a specific purpose, and in the nature of a bailment. All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and the other kind of de-

posit, of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker."

In *Massey vs. Fisher,* 62 Fed. 958, at page 959, it is said:

"The bank having failed to apply the money to the note can it be recovered from the receiver? His counsel thinks not, because the bank placed the money in its vaults with other money of its own, whereby its identity was lost. Why should this wrongful act defeat the plaintiffs' right? Nobody is injured by allowing the plaintiffs to take the amount from the deposit. The receiver and creditors stand on no higher plane than the bank, and can no more assert that it was the bank's money than the bank could. It is true, they are entitled to all the bank's property; but this was not its property. It is not important that the plaintiffs' money bore no mark, and cannot be identified. It is sufficient to trace it into the bank's vaults, and find that a sum equal to it (and presumably representing it) continuously remained there until the receiver took it. The modern rules of equity require no more."

See also

Empire State Surety Co. vs. Carroll County, 194 Fed. 605;

Erie R. Co. vs. Dial, 140 Fed. 689;

National Bank vs. Insurance Co., 104 U. S. 54.

In *Brennan vs. Tillinghast,* 201 Fed. 609, the complainant borrowed from the First National Bank

of Ironwood $1,000.00, and as collateral thereto, deposited with the bank 200 shares of the capital stock of a copper company. Subsequently, the complainant deposited with the bank $1,000.00 for which he received a certificate of deposit and which, as was held by the court, was received by the cashier with the understanding at the time that it was to be used in paying Brennan's note. Thereafter the bank, without the knowledge of Brennan, sold 195 shares of the said copper company for $3,558.75. This amount was deposited in the National Bank of Duluth to its credit. At this time the Ironwood bank was indebted to the Duluth bank, and it drew its drafts in the usual manner against the account until the credit was exhausted. On May 11, 1909, the Ironwood bank owed the Duluth bank something in excess of $1,000.00. When on June 21, 1909, the Ironwood bank closed its doors, it had in its vaults a sum in excess of $8,000.00, and in holding that Brennan was entitled to a preference, the court said:

> "It is undisputed that the proceeds of the sale of Brennan's stock, wrongfully converted by the Ironwood Bank to its own use, constituted a trust fund, which did not lose this character when mingled with other moneys of the bank, and that Brennan was entitled to recover the amount thereof as a preferred claim, if, and to the etxent that, he sustained

the burden of proof of tracing this money, either in its original shape or in a substituted form, into the moneys which came into the hands of the receiver as part of the assets of the bank. * * *

"And proof that the tort-feasor has mingled the trust funds with his own and made payments thereafter out of the common fund, is, nothing else appearing, a sufficient identification of the remainder of that fund coming into the hands of the receiver, not exceeding the smallest amount the fund contained subsequent to the commingling as trust property, under the legal presumption that he regarded the law and neither paid out the trust fund nor invested it in other property; but kept it sacred."

In *National Bank vs. Insurance Company,* 104 U. S. 54, it is said (p. 66):

"But although the relation between the bank and its depositor is that merely of debtor and creditor, and the balance due on the account is only a debt, yet the question is always open, To whom in equity does it beneficially belong? *If the money deposited belonged to a third person, and was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account.*"

So that under the ruling in the 104 U. S. and the 94 Fed. *supra* the City's money in whatever bank at the time of the failure of the appellant bank, belonged to the City whether, as contended by counsel, the mere relation of debtor and creditor

existed between the appellant bank and its reserve or correspondent banks, the only question being, was there at all times after the deposit of the City's money in the possession of the appellant bank a sum equal to or in excess of the amount of the trust fund.

Appellants, under the circumstances of this case, are in no position to contend that the money was not actually received by the appellant bank, or that it paid out the City's money instead of the bank's funds.

In *Merchants' National Bank vs. School District Number Eight, supra,* this court said:

> "Neither the bank nor the receiver is now in a position to say that the money received by the bank's agent was not actually received by the bank. The question is not complicated by any failure on the part of the Boston bank to pay the Helena bank in full the amount which it received. The Helena bank received the money in the due course of business. In view of the receipt of that sum by its agent, and the arrangement which it made with Palmer on behalf of the school district, it will be deemed to have diverted from its funds in bank on July 11, 1896, the sum of $13,056.00 and to have placed the same to the credit of the school district. That sum became and was from that date a trust fund, subject to disbursement only upon the order of the school district."

See also

Widman vs. Kellogg, 133 N. W. (North Dakota) 1020,

where at page 1024 it is said:

> "And why, we ask, should the bank, or the receiver standing in its stead, be heard to assert as against the rightful owner of moneys that in paying creditors of the bank it paid money that belonged to appellant and which it held in a trust capacity, instead of paying its own money? To hold that the bank may take such a position and maintain it in a court of equity, seeking to do equity, would be to permit the bank to take advantage of its own wrong, to its own benefit, and to the detriment of the innocent party it has injured."

The rule announced in *Duel vs. Hollins, et al.,* Nos. 352 and 353, decided by the Supreme Court June 5th, 1916, we submit, requires the affirmance of the decree appealed from. In that case the Supreme Court of the United States reversed the United States Circuit Court of Appeals, which held that on the bankruptcy of a broker, a customer claiming title to a certain number of shares of stock, must either identify his certificates, or show that other certificates then on hand for a number of shares equal to or in excess of the number claimed by him were intended to be substituted by the broker for those of the customer which the broker had previously disposed of.

The Supreme Court, in holding the decision of the United States Circuit Court of Appeals erroneous, quoted from *Gorman vs. Littlefield,* 229 U. S.

19, those portions of the opinion which held as follows:

First. It is unnecessary for a customer to be able to put his finger upon the identical certificates of stock purchased for him.

Second. It was the right and duty of the broker, if he sold the certificates and used his own funds, to keep the amount good, and this he could do without depleting his estate to the detriment of other creditors who had no property rights in the certificates held for particular customers. No creditor could justly demand that the estate be augmented by a wrongful conversion of the property of another in this manner, or the application to the general estate of property which never rightfully belonged to the broker.

The Supreme Court then concluded:

> "Merely because the one (certificate) actually in the box represented insufficient shares to satisfy all, is not enough to prevent the application of that rule so far as the circumstances will permit."

If we apply the rule to the case at bar what is the result? A trust fund of the City of Centralia was placed in the bank, with the knowledge of the bank that it was a trust fund. General depositors deposited money with the bank so that their money became the money of the bank and they became its

creditors. The bank failed with enough money on hand to pay the trust fund. The receiver—who is in the same position as the bank—takes the position that the City must put its finger on the specific fund. To sustain this contention would require the court to disregard *Duel vs. Hollins,* and *Gorman vs. Littlefield, supra,* as well as the decisions of this court, and to hold that the receiver, as a representative of the bank and its general depositors, "could justly demand that the estate be augmented by a wrongful conversion of the property of another in this manner, or the application to the general estate of property which never rightfully belonged to the broker," a claim which those cases hold no creditor has a right to assert.

The fallacy of appellant's contention consists in placing the City of Centralia, the owner of a specific fund which never became the property of the bank, upon the same footing as a general creditor of the bank who is only asserting the right to have the property of the bank applied to the payment of the debts of the bank. The general depositors claim a lien upon the property of the bank. Appellee claims its own property, of which the bank had the custody but to which the bank had no title.

The trust fund augmented the general assets

and on equitable principles the appellee is entitled to have its claim paid out of the money that went into the hands of the receiver.

Spokane vs. Bank, 68 Fed. 982.

Beard vs. District, 88 Fed. 375.

Smith vs. Township, 150 Fed. 257.

San Diego vs. Bank, 52 Fed. 59.

Page County vs. Role, 106 N. W. (Iowa), 744.

Am. Can. Co. vs. Williams, 178 Fed. 420.

St. Louis Ry. vs. Johnson, 133 U. S. 566, 576, 578.

Western German Bank vs. Norrice, 134 Fed. 724, 726.

Appellant claims in their Fourth assignment of error that the court erred in finding that the City's claim should be paid in full, without first ascertaining what proportion, if any, of the funds of the appellant bank on hand at the time of its failure was properly applicable to the payment of the City's claim in preference to other claims.

This complaint, we submit, cannot be sustained, for on the 8th day of February, 1915, the court made its order for a preliminary injunction in the cause, and on the 10th day of February, 1915, a writ of preliminary injunction was issued out of the court and cause, requiring the receiver to hold in his

possession until the further order of the court a sum sufficient to cover the City's claim, after making allowances for the expenses of administering the estate, of the moneys then in his hands or in the possession of the receiver, to be paid to the City if it should be held upon the final hearing that it was entitled to have said money paid to it in preference to the general depositors and creditors of the appellant bank. (Tr. pp. 122-126.) The receiver, therefore, had ample opportunity to hold a fund sufficient to provide for the payment of the City's claim in full, even if he had to defer dividends to general creditors on account of our and other preferred claims. There is no contention that he was not able to comply with the order of the court, notwithstanding other preferences may be claimed. If, however, any question should arise in the future with respect to preferences between the appellee and others, that question will be determined in the proper court where all the parties in interest can be properly heard.

39 *"Cyc"* 540, 541 and note 38.

The decree of the lower court is in full accord with the decisions of this court and the decisions of the Supreme Court of the United States, and it

is, therefore, respectfully submitted that the same should be affirmed.

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